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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1290

JO ANNE ATWELL,

Petitioner,

v.

RETAIL CREDIT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Are there any special or important questions presented which warrant issuance of a Writ of Certiorari?

1. Is the general rule, which is in effect in every American jurisdiction, that the statute of limitations ordinarily begins to run from the date on which the cause of action accrues regardless of the plaintiff's knowledge thereof, unconstitutional?

2. Was there in the case at bar legally sufficient evidence to justify submitting to the jury the question

of fraudulent concealment by the defendant of the plaintiff's cause of action?

STATEMENT OF THE CASE

This case involved an action of libel filed by Jo Anne Atwell on September 8, 1967, for allegedly defamatory publications by Retail Credit Company contained in mercantile credit reports. The Declaration as originally filed claimed $150,000 in damages, but was amended to include an additional claim of $150,000 for punitive damages.

Retail Credit Company issued several reports and copies of reports on Jo Anne Atwell from 1965 to a date several months before the date on which suit was filed as to all of which the plaintiff sought to establish a cause of action against Retail Credit. The trial court held that the statute of limitations barred claims on all publications which the plaintiff proved except two such reports, one dated May 18, 1967, sent by Retail Credit to Eunice Evans, the third party defendant, on which suit was filed within the one year period of the Maryland statute of limitations, and the other dated June 27, 1966, published by Retail Credit to Employer's Mutual Casualty Company ("Emcasco") with respect to which the jury was permitted to determine whether the running of the statute of limitations was suspended as a result of fraudulent concealment by Retail Credit.

The jury returned verdicts in favor of the plaintiff against Retail Credit in the amount of $100,000 in compensatory damages and $500,000 in punitive damages for publication of the June 27, 1966 report to Emcasco, and in favor of the plaintiff against Retail Credit for no damages as to the report dated May 18, 1967. On remittitur, the plaintiff consented to entry of a judgment in the amount of $150,000 in punitive damages (incorrectly stated

in the Petition as $250,000, Petition p. 7) and $100,000 in compensatory damages.

Retail Credit appealed the judgment. The plaintiff filed no cross-appeal to raise, as to the earlier reports which the trial court had held barred by the statute of limitations, the principal contention on which her Petition for Certiorari is based. The contention has as much or as little applicability to these reports as it does to the report of June 27, 1966.

Retail Credit is a mercantile credit reporting agency engaged in Maryland and throughout the United States in the service of conducting investigations and issuing reports to its subscribers. Many of the reports are prepared by Retail Credit at the request of insurance companies to provide them with information for the purpose of determining whether to grant or continue life insurance and automobile insurance policies (App. 280-282). Reports received by the insurance companies are kept strictly confidential (Defendant's Ex. 6, App. 44). The only employees who look at the reports in any depth are the individual underwriters (App. 283).

The plaintiff was born in 1942 and grew up in the Sykesville, Maryland area, a community with a population of approximately 1,200 persons (App. 164) which includes the crossroad known as Eldersburg. The plaintiff was married on March 13, 1963, separated the following February, and was divorced on June 21, 1965 (App. 134, 223). Between 1965 and 1967 the following reports regarding the plaintiff were prepared by Retail Credit: report of August 16, 1965, mailed to State Farm Mutual Insurance Company (Plaintiff's Ex. 2, App. 25-26); report of April 11, 1966 mailed to Monumental Life Insurance Company (Plaintiff's Ex. 3, App. 27) (the report is incorrectly dated August 11,

1966 at Petition p. 3); report of June 27, 1966 mailed to Employers Mutual Casualty Co. (Plaintiff's Ex. 6, App. 30-31); and a report of May 18, 1967 mailed to Paramount Insurance Co. (Plaintiff's Ex. 1, App. 23-24). A further report to Paramount dated June 12, 1967 was prepared but was not delivered (Plaintiff's Ex. 4, App. 28-29). Each report was prepared on or about the day the report is dated.

In addition to other information, the reports contained information, stated in varying language, to the effect that the plaintiff had the general reputation of being a lesbian. The relevant portions of the June 27, 1966 report state:

> "21. Personal-family reputation or associates questionable? x[yes]
>
> * * * * * *
>
> 21. Insured's personal reputation suffers to large degree in community due to immoral relationships with other women. This was cause of divorce, marriage lasted very short period of time only" (Plaintiff's Ex. 6, App. 30-31).

Under the established practice of destroying prior reports of the same category (App. 125, 249) the State Farm file copy, being an automobile report, was destroyed at the time the June 27, 1966 report to Emcasco was prepared. The Emcasco report was destroyed on or about May 18, 1967, since it had been up-dated by the Paramount report.

The plaintiff began to experience difficulty regarding insurance on October 10, 1965, when State Farm canceled her automobile insurance after having insured her for three years (App. 197, Tr. 137). She thereupon obtained insurance from AAA; however, because she became dissatisfied with the service given by AAA and the cost of the insurance (App. 221-222), she applied for automobile insurance to Nationwide, North American, and perhaps other companies (App. 197-202, 222-223), all of which de-

clined to issue automobile insurance to her. During this period Monumental Life declined to issue life insurance to her (Tr. 178). On June 7, 1966, Emcasco issued her a policy, and she terminated her insurance with AAA. In late April or early May, 1967, Emcasco notified her that her insurance would not be renewed for the following year (Tr. 165; App. 178-179, 199-200). As matters developed, Emcasco continued her liability coverage (Tr. 168), and at the date of trial she owned collision insurance obtained through Ford Credit (App. 202).

Upon receipt of the Emcasco notice of non-renewal the plaintiff telephoned her insurance agent and telephoned Emcasco in Philadelphia (App. 199). Thomas V. Murphy, of the office of the Maryland Insurance Commissioner, who had received a copy of the notice, wrote the plaintiff on May 4, 1967, and the plaintiff and Murphy thereafter had several telephone conversations in regard to the notice (App. 179, 200). After contacting an employee of Emcasco by telephone and letter (Tr. 163; App. 179) Murphy called the plaintiff and informed her that Emcasco had decided not to renew for reasons relating to her divorce. At Murphy's request the plaintiff read over the telephone her entire divorce records and Murphy stated that the cancellation was related to the fact that she shared an apartment with another girl (App. 200). On the next day the plaintiff and Ellen Kilgore conferred with Murphy at his office (App. 200). By a letter dated May 31, 1967, Emcasco informed the plaintiff that her collision insurance would not be renewed, but that Emcasco would continue to carry her liability insurance (App. 179-180, 183). On May 31, 1967, the plaintiff informed Murphy that she would consult her insurance agent in order to obtain collision insurance from another carrier, and Murphy closed his file (App. 180).

Shortly before May 17, 1967, Eunice Evans, who was an employee of Paramount, without having received instructions or authority from her employer to do so, and in violation of a rule of Paramount, prepared a request for a report on the plaintiff on a Paramount form and mailed the request to Retail Credit (App. 113; Tr. 108, 628-629). Eunice Evans subsequently received in the mail of Paramount a report from Retail Credit dated May 18, 1967, which she took from the office to her apartment, and kept in her apartment until the time of the trial (App. 113; Tr. 111-112).

On or about May 18, 1967, Retail Credit received the unauthorized request initiated by Eunice Evans. It was prepared on a standard form designating Paramount as the subscriber, showing, as is normal, a Paramount policy number, and indicating that the report was requested for purposes of automobile insurance (App. 54, 133). Shortly thereafter, Richard Coppersmith, an experienced investigator (App. 51) who was in charge of the two-man Westminster "satellite" office of the Catonsville branch office of Retail Credit, prepared a report on the plaintiff and mailed the original to Paramount. Retail Credit's file on the plaintiff containing the information concerning such prior reports was transferred to the Westminster office to facilitate Coppersmith's investigation (App. 91). Among other information contained in the report were statements to the effect that the plaintiff was reputed to be a lesbian and that such conduct led to her divorce (Plaintiff's Ex. 1, App. 23-24). Immediately below such statements the following information disclosing the existence of prior reports, including the Emcasco report, appeared:

> "INFORMATION: Confirmed through reputable business sources in position to know the facts and through established files through alternate inspectors. PPC:

On 6-27-66 reported on same car, Pol. #957 29 15 to Employers Mutual Cas. Co. 5900 York Rd., Balto., Md. 21212. We also copied that on 7-1-66 under Pol. # MK-90 993 for Eastern Auto Undwg. Dept. Kemper Ins. Group, 2nd Floor Summit, N.J. Also on 8-16-65 reported on same car, Pol. # 1070 962-D10-20A to State Farm Mutual Auto Ins. Co., 800 Oak St., Frederick, Md."

On June 7, 1967, the plaintiff called J. A. Cronin, who was then the manager of the Catonsville office of Retail Credit and who had been an employee of the company for twenty years (App. 244). During the telephone conversation she indicated that she wished to discuss a report concerning her prepared by Retail Credit (App. 246). An appointment was made for later that day (App. 205, 246). Following the conversation Cronin obtained and read all or parts of a copy of the Paramount report of May 18, 1967, the only report on the plaintiff then in the file (App. 248), since it has been the company's policy to destroy prior reports retaining only the current, up-dated report (App. 125, 249, 266-267). In preparing for trial Retail Credit could not locate a file copy of the Emcasco report, but had to apply to Emcasco for a copy (App. 132, 266), demonstrating that destruction of the Emcasco report in the regular manner had occurred. On the same afternoon, the plaintiff met Cronin in his office for a period of approximately one hour (App. 254). During that meeting she informed him that she had with her in her pocketbook (App. 206-207, 234) a report prepared by Retail Credit pertaining to her, and that the report contained information to the effect that she was reputed to be a lesbian. She also quoted several lines of the report (App. 250), and stated that she had been turned down twice for automobile and life insurance and that she had contacted the

Insurance Commissioner (App. 247, 263). She stated that she had contacted an attorney and that he had agreed to handle her lawsuit against Retail Credit (App. 206, 234, 268), and that she had hired a private investigator to determine the source of the information contained in the report (App. 247, 255).

She further informed Cronin that she did not want to get anyone in trouble and that she simply wanted the matter straightened out (App. 233, 248). Cronin stated that he did not either admit or deny that Retail Credit had prepared a report on the plaintiff (App. 264). Both the plaintiff and Cronin testified that the plaintiff did not specifically ask about the Emcasco report and Mr. Cronin did not mention it (App. 206, 263).

Mr. Cronin agreed that a new investigation would be made and that Retail Credit would send the results of that investigation to such of its customers who had obtained reports on Jo Anne Atwell as she designated (App. 255-256). Both Cronin and Jo Anne Atwell testified that the new investigation was to concern the plaintiff's reputation in the community, *i.e.*, it was to consist of further inquiries of Sykesville residents (App. 206, 208, 254, 255). There is no evidence to support the assertions at Petition pp. 6, 19, that either Cronin or the plaintiff understood that there was to be an investigation of contents or addressees of prior reports by Retail Credit. The plaintiff's counsel by his letter of July 11, 1967, demonstrated that the concern of the plaintiff when she visited Cronin on June 7, 1967, was with future reports, not previous ones (App. 46).

According to Cronin's testimony, at the conclusion of the conference Cronin and the plaintiff had agreed that

she would contact Cronin regarding the new investigation within two or three weeks after their conference (App. 248, 255-256). According to the plaintiff's testimony, Cronin was to contact her within two weeks after the conclusion of the new investigation (App. 208).[1] In any event the next communication between the parties was a letter dated June 19, 1967, from her attorneys informing Retail Credit that they represented the plaintiff in her claim against Retail Credit for libel and slander (Tr. 645, Defendant's Ex. 7, App. 46).

Following the conference between the plaintiff and Cronin on June 7, 1967, and pursuant to their agreement, a reinvestigation of the plaintiff was conducted extending over the period from approximately June 8, 1967 to July 14, 1967, and revised reports were prepared, one of which, a draft dated June 12, 1967, was prepared to be sent to Paramount; however, because that report was incomplete, and because it was learned that the request for the prior report on the plaintiff had not in fact been initiated by Paramount, that report was not delivered to Paramount (App. 256, 292, 295).

The accuracy of the information in the Emeasco report regarding the plaintiff's reputation was confirmed at the trial by four witnesses. James Richard Gardner, the owner of a service station in Eldersburg (App. 119, 161), testified that he had lived in Eldersburg all his life, that he had worked at the station since the age of thirteen, that he knew a substantial portion of the Sykesville-Eldersburg

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[1] Defendant's Ex. 11 for identification was a pre-litigation letter dated July 17, 1967, from counsel for Retail Credit to plaintiff's counsel stating that the plaintiff was to recontact Retail Credit. It was proffered that the letter and the failure of plaintiff's counsel to deny or contradict the statement were evidence to support Cronin's version of what happened. However, the trial court refused to admit such letter and testimony (App. 290-293).

community, and that he had heard of the plaintiff's reputation both at the service station and elsewhere. He stated that the plaintiff's reputation regarding her relationship with women had existed since she was in high school (App. 166). George Edward Gardner, who was born and grew up in Sykesville and had worked at his brother's service station for twelve years, testified that the plaintiff's reputation regarding her relationship with women had existed since several years before her marriage (App. 173).

Mrs. Deanna Purkey, the wife of the owner of Sykesville's only taxicab company, who herself had driven cabs for two and a half to three years and who at the date of trial was not acquainted with the plaintiff, but who lived on the same street as the plaintiff, confirmed the Gardners' testimony as to the plaintiff's reputation (App. 278). Mrs. Julie Green, who had lived in the area for sixteen or seventeen years (App. 270), who had been employed at the Sykesville post-office for almost seven years (App. 270) and who had been an acquaintance of the plaintiff for approximately fourteen years and was a next-door neighbor of the plaintiff, testified to the same effect (App. 271-272).

No contradictory testimony was offered regarding the plaintiff's reputation. The plaintiff called three character witnesses, Joseph F. Geppi, Charlotte Cowan and L. Carroll Yingling, Jr. Geppi, a resident of Pikesville, Maryland, testified only as to the plaintiff's reputation at her place of employment at Westinghouse on Washington Boulevard (20 miles from Sykesville) (Tr. 401). Yingling testified only to the plaintiff's reputation between 1954 and 1959 when the plaintiff was between twelve and seventeen years old and over seven years before the report in question was published (Tr. 554). Charlotte Cowan was

a resident of Randallstown, Maryland (Tr. 406) and testified that she knew a few people in Sykesville but not many (Tr. 407-8, 409). She therefore was not qualified to testify as to reputation in the community.

In her Petition for a Writ of Certiorari the plaintiff argues that until the one year statute of limitations had expired she was unaware of the existence of her cause of action for libel arising from the Emcasco report of June 27, 1966. Due to repeated misstatements made by the plaintiff, some sworn and others unsworn, the facts regarding her knowledge of her cause of action are somewhat difficult to determine. The evidence in this regard is as follows:

a. In early May 1967 Mr. Murphy of the Insurance Commissioner's office informed the plaintiff and Ellen Kilgore that Emcasco had declined to renew the plaintiff's automobile insurance for reasons relating to the cause of her divorce and her sharing an apartment with Ellen Kilgore (App. 200).

b. On deposition the plaintiff testified that she then asked a friend employed at Paramount Insurance Company, later identified as Eunice C. Evans, to obtain information regarding the reason for cancellation of her insurance (App. 210-213).

c. At the trial (after it had become evident that her activity in initiating the request for the Paramount report would bar her recovery on the report, see *Watwood v. Credit Bureau, Inc.*, 97 A. 2d 460 (D.C. Mun. App., 1953)) she testified that Eunice Evans acted as a volunteer in obtaining the Paramount report (App. 204).

d. Eunice Evans testified that she took the copy of the Paramount report dated May 18, 1967 to her apartment

and kept it there (App. 113), and in the plaintiff's sworn answers to interrogatories the plaintiff stated that she discussed the Paramount report with Eunice Evans at Eunice Evans' apartment in May or June of 1967 (App. 243).

e. At the trial the plaintiff testified that the latter discussion with Eunice Evans actually occurred approximately a year and a half later in January 1969 (App. 202).

f. The plaintiff further testified at the trial that Charlotte Cowan, another friend of the plaintiff's, had discussed the Paramount report with Eunice Evans and that Charlotte Cowan disclosed portions of the contents of the Paramount report to the plaintiff during a discussion with the plaintiff which occurred in early June 1967 (App. 209-217). (She further testified that at the time of her deposition she knew that the testimony given on deposition was untrue, App. 216-217).

g. At her meeting with Cronin on June 7, 1967, the plaintiff stated that she had with her a copy of a Retail Credit report containing information to the effect that she was a lesbian (App. 206-207, 234). She even quoted several lines of the report (App. 230). At the trial the plaintiff testified that this statement to Mr. Cronin was false (App. 206-207).[2]

On the basis of the foregoing contradictory testimony it it is, as the Fourth Circuit concluded (Petition, p. 6a), impossible to conclude that the plaintiff was not aware or on notice of the Paramount and Esmasco reports and of their contents at the time of her interview with Cronin on June 7, 1967.

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[2] She also testified that previous statements made to Mr. Cronin on June 7, 1967, that she had engaged an attorney were also false (App. 205).

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONALITY OF APPLICATION OF THE MARYLAND STATUTE OF LIMITATIONS IN THE CASE AT BAR.

A. The issue of the Constitutionality of the *Maryland Statute of Limitations as Applied to the Plaintiff's Cause of Action* is not of the Character set forth in Rule 19 of this Honorable Court.

The Court of Appeals for the Fourth Circuit in this case held that the Maryland statute of limitations began to run from the date of publication of the Emmanco report and that there was no legally sufficient evidence of fraud to merit submitting that issue to the jury. The constitutionality of the application of the statute of limitations does not involve a decision of the Fourth Circuit in conflict with that of another circuit, a decision in conflict with applicable state or federal law, an important question of federal law, or a departure from the accepted and usual course of judicial proceedings. Rules of the Supreme Court of the United States, Rule 19.

B. The Constitutionality of the *Application of the Maryland Statute of Limitations* in the Case at Bar was not *Properly Presented Below*.

In its trial memorandum filed before trial, in its request for instructions, in its post-trial motions, and in its briefs on appeal, Retail Credit Company asserted the Maryland statute of limitations as a defense to the plaintiff's causes of action. With respect to two reports on which the plaintiff sued, the State Farm report of August 18, 1965, and the Monumental report of April 11, 1966, the District Court held, upon Retail Credit's motion for directed verdict, that the Maryland statute of limitations barred the plaintiff's

causes of action in spite of the fact that at the expiration of the period of the statute of limitations, the plaintiff was unaware of the existence of the State Farm and Monumental reports and, therefore, of her causes of action thereon. The plaintiff advanced no arguments in the trial court to the effect that such a ruling would be unconstitutional. She filed no cross-appeal to contest the ruling.

At no time until the date on which she filed her Petition for rehearing in the Fourth Circuit did the plaintiff assert a constitutional issue regarding the application of the statute of limitations.[3]

It is well settled that this Honorable Court ordinarily will not decide constitutional questions which were not pressed in the lower courts and, therefore, with respect to which this Honorable Court lacks the benefit of the judgment of the lower courts.

> "The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. [citation omitted.] This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed. [citations omitted.] *Duignan v. United States*, 274 U.S. 195, 200 (1927).
>
> "Only in exceptional cases will this Court review a question not raised in the court below. [citations

[3] In her Brief of Appellee filed in the Fourth Circuit the plaintiff states at pp. 18-19, "It has been intimated that without the discovery test, statutes of limitations would be unconstitutional as a deprivation of due process of law." However the latter statement does not, without more, constitute presentation to the Court of a constitutional issue. It is not unreasonable to infer that the plaintiff's reason for filing the Petition for Rehearing was to avoid the contention that she had not properly presented the constitutional issue below.

omitted.) There are no exceptional circumstances here." *Lorain v. United States*, 355 U.S. 339, 362-363 (1958).

C. The Decision of the Fourth Circuit with Respect to Application of the Statute of Limitations was a Correct and Valid Application of the Maryland Law.

The Maryland statute of limitations, Article 57, §1, provides that all actions for libel and slander shall be brought within one year from the time the cause of action "accrued." It is the settled law in Maryland and in every other American jurisdiction in which the question has been considered that limitations begin to run with respect to actions for defamation from the date of publication of the libel (which is the date on which the cause of action accrues) without regard to the date on which the plaintiff discovers the cause of action. *Miles v. McGrath*, 4 F. Supp. 653 (D. Md., 1933); *C. W. Humphrey Co. v. Security Aluminum Co.*, 31 F.R.D. 41 (E.D. Mich., 1962); *Riley v. United States*, 212 F. 2d 682 (C.A. 4, 1954); *Grist v. Upjohn Co.*, 1 Mich. App. 72, 134 N.W. 2d 358 (1965); *Hartmann v. Time, Inc.*, 64 F. Supp. 671 (D. Pa., 1946), rev'd on other grounds, 166 F. 2d 127 (C.A. 3, 1947), cert. den. 334 U.S. 838 (1948); *Lehigh Chemical Co. v. Celanese Corp. of America*, 278 F. Supp. 694 (D. Md., 1968); *Brown v. Chicago, Rock Island and Pac. R. R.*, 212 F. Supp. 632 (W. D. Mo., 1963), *aff'd*, 323 F. 2d 459 (C.A. 8, 1963); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418 (N.D. Ga., 1969), *aff'd*, 429 F. 2d 31 (C.A. 5, 1970); *Bernstein v. Commercial National Bank*, 161 La. 38, 108 So. 117 (1926); Annot. "Publication" *of Libel for Purposes of Statute of Limitations*, 1 A.L.R. 2d 394 (1948).

It is equally well settled in Maryland, as in other jurisdictions, that, with respect to causes of action in general, limitations begin to run on the day on which the cause of

action accrues regardless of the plaintiff's knowledge thereof. *Killen v. George Washington Cemetery, Inc.*, 231 Md. 337, 189 A. 2d 847 (1963); *Abell v. Harris*, 11 Gill. & J. 367 (1841); *Blaye v. Roberts*, 62 Md. 510, 13 A. 388 (1883); Consolidated Public Utilities Co. v. Suite, 152 Md. 371, 136 A. 625 (1927); and Gloyd v. Talbert, 221 Md. 179, 156 A. 2d 665 (1959).

The District Court and the Fourth Circuit both concluded on the basis of Maryland law that the statute of limitations began to run against the plaintiff's actions for libel from the date of publication of the credit reports, and the plaintiff cites no contrary authority in her Petition.[4]

> "(O)rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

The precise constitutional question presented in the Petition is somewhat unclear: The only federal authority cited is *Urie v. Thompson*, 337 U.S. 163 (1949). That case, however, is a decision under the Federal Employers' Liability Act and involves the statutory construction of the limitations provision of a federal act by a federal court. No constitutional issue was presented for consideration by the Court, and the decision, therefore, has no bearing whatever on the constitutional issue presented in the Petition.

In no case cited in the Petition has it ever been held that application of the statute of limitations to bar a cause of action unknown to the plaintiff constitutes a denial of

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[4] At p. 10 of her Petition the plaintiff cites five Maryland cases in which, the Petition asserts, the Maryland Court of Appeals has applied a "discovery rule" in certain actions for professional malpractice. As the Petition admits, these cases were not decided on constitutional grounds and in Chief Judge Haynsworth's opinion (App. 3a) the Fourth Circuit correctly distinguishes these cases.

a constitutional guaranty. *Ayers v. Morgan*, 307 Pa. 392, 161 A. 2d 782 (1959) (cited at Petition, p. 10) involved a personal injury action brought by a patient against a surgeon who had negligently left a sponge in the patient's abdomen. The applicable Pennsylvania statute of limitations provided for a period of two years from the time "when the injury was done." In both the majority opinion and Judge McBride's opinion the conclusion that the period of limitations began to run when the plaintiff became aware of the existence of the sponge in his abdomen was based upon presumed legislative intention.

D. *The Legal Principle Propounded in the Petition is not Applicable Under the Facts of this Case.*

The specific constitutional principle propounded by the plaintiff appears to be (as set forth in the Petition, p. 13) that the Constitution requires with respect to "undiscoverable" causes of action that statutes of limitations begin to run only from the date of discovery of the cause of action.

(1) Whatever "undiscoverable" may mean for constitutional purposes, publication of a libel is not "undiscoverable." An essential element of defamation is publication to a third person. A libel of necessity must be known both to the defendant and to at least one third party. The alleged libel in the instant case was an ordinary confidential business communication. Application of an "undiscoverable tort" principle to such confidential communications would be patently inconsistent with the existing policy of the law which confers a privilege upon such a communication provided that it is confidential, i.e., that publication is made only to third persons who have an interest in the content of the publication. Annot. *Libel and Slander: Report of Mercantile Agency as Privileged*, 39 A.L.R. 2d 776 (1953).

Moreover, it would be impossible to establish on any firm constitutional basis a rule regarding "undiscoverable

torts" which would be applicable to a libel occurring during a confidential communication but not applicable to other torts which injure a person or his property without his knowledge.

(2) The alleged libel contained in the Encasco report, in addition to being discoverable, was in fact discovered by the plaintiff within sufficient time for her to commence an action thereon. As the Fourth Circuit expressly found (Petition, pp. 6a-7a), the plaintiff knew or should have known of her cause of action on the Encasco report at least as early as June 7, 1967, nineteen days before the period of the statute of limitations expired. A contrary conclusion cannot reasonably be reached even by the most credulous and, from the point of view of the plaintiff, favorable interpretation of the inconsistent, admitted false and occasionally perjured testimony of the plaintiff.[5]

The Petition asserts that an unaware victim of a tort must have reasonable opportunity to assert his rights, and that "(t)his reasonable opportunity should be measured by having the legal period of limitations operate from the time of his awareness." (Petition, p. 13). The latter conclusion, however, does not follow logically from the premise. Even assuming that some constitutional guarantee prohibited application of a statute of limitations to bar the claim of a plaintiff who was unaware of his cause of action, nevertheless, there is no reason why the period of limitations should be extended for any longer time than a reasonable time after the discovery of the tort within which to file suit. In

[5] In early May 1967 the plaintiff was aware that Encasco had terminated her insurance for reasons relating to the cause of her divorce and her relationship with Ellen Kilgore. From the information on the Paramount report obtained by Eunice Evans on or about May 19, she was aware that Retail Credit had published a report to Paramount making reference to similar facts and that Retail Credit had previously published a report to Encasco on June 27, 1966.

the present case the plaintiff had such a reasonable period of time after discovery of the Kinsman report within which to file suit.

E. *Application of the Constitutional Principle Proposed by the Plaintiff would have Chaotic Consequences.*

If the plaintiff's position were adopted, it would seem to follow that no period of limitations could validly be imposed under local, state or federal law with respect to "undiscoverable" torts no matter how long the statutory period might be. There would be no end to the threat of suit by the ignorant aggrieved. Circumstances would undoubtedly arise, due for example to the advanced age of key defense witnesses, under which an injured party would find it very much in his financial interests to maintain his state of ignorance until the most opportune moment.

The consequences of adoption of the constitutional principle proposed by the plaintiff would be catastrophic for persons such as Retail Credit Company. Overnight Retail Credit would become potentially liable for every defamatory report which it has ever published with respect to which the subject of the report could prove his own ignorance. In view of the propensity of juries to award large verdicts against credit reporting agencies (evidenced by this case and by the verdict of $8,610,000 awarded in *National Apparel Adjustment Council, Inc. v. Dun & Bradstreet, Inc.*, New York, L. J., July 3, 1969) the potential liability to Retail Credit is unlimited.

F. *Federal Legislation has been Enacted which Assures a Plaintiff's Awareness of the Publication of Credit Reports.*

Whether persons about whom a credit report is issued should be given some protection not available under the

law in effect in 1967 is a matter more appropriately resolved by legislative then by judicial action. Congress has done just that. On October 26, 1970, the Fair Credit Reporting Act, Public Law 91-508, Title 15 U.S.C.A. §1601 et. seq. was approved effective 180 days thereafter, providing in Sections 606 and 609 that credit reporting agencies are to make prompt and complete disclosure to the subjects of their reports. Therefore, individuals are now assured of an opportunity to commence legal proceedings to remedy any defamatory statements which may be contained in credit reports.

The Act provides at Section 618 for a two-year statute of limitations which, under certain circumstances, might be applicable to a person unaware of his cause of action. Under the plaintiff's reasoning, presumably this provision would be unconstitutional if so applied.

II.

SUFFICIENCY OF THE EVIDENCE OF FRAUDULENT CONCEALMENT.

A. *The Issue of the Sufficiency of the Evidence of Fraudulent Concealment Is Not An Appropriate Matter for Review by this Honorable Court.*

Although it is couched in terms of a constitutional issue of the right to trial by jury, the second question presented in the Petition is merely a question of the legal sufficiency of the evidence. It therefore is of no consequence other than to the parties at bar:

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Address of Chief Justice Vinson before American Bar Association, September 7, 1949, as reported in Stern

and Greenman, *Supreme Court Practice*, p. 189 (4th Ed., 1969).

"We do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227 (J. Holmes, 1925).

B. The Fourth Circuit Correctly Concluded That The Plaintiff Had Adduced Insufficient Evidence of Fraudulent Concealment.

The sole basis of the plaintiff's contention regarding fraudulent concealment of her cause of action is that at their conference of June 7, 1967, Cronin did not disclose to the plaintiff information regarding the Paramount report which was in his possession. The answer to the plaintiff's contention in this regard is set forth at some length in the opinion of the Fourth Circuit (Petition, App. 4a-7a), and at great length in the Retail Credit briefs in the Fourth Circuit. A short and irrefutable answer, however, is that at their conference of June 7, 1967, the plaintiff told Cronin that she had a copy of the Paramount report with her in her purse. The plaintiff is therefore constrained to argue in her Petition that she was lying to Cronin, that Cronin knew she was lying (Petition, p. 19) and (presumably) that it was fraudulent for Cronin to pretend to believe her.

> "Though Petitioner later stated that she had the Paramount report, Mr. Cronin's actions throughout the conference indicated he did not believe Mrs. Atwell. Otherwise, why would he conceal the report in his desk?" (Petition, p. 19).

There is no evidence in the record that at their conference of June 7, 1967, Cronin made any misrepresentation to the plaintiff whatever. He did not disclose the contents of the Emonco report to the plaintiff at that time but (a) he had not read that report (App. 248), (b) the plaintiff

did not ask him for information regarding that report (or any other report),[6] and (c) he was under no duty to disclose any information to the plaintiff, particularly since she stated that she had engaged counsel to sue Retail Credit for libel (App. 208, 234, 247).

The Petition asserts at page 20 that the jury may decide an issue if there is "any legally relevant and competent evidence, however slight," from which a fact in issue may be inferred. The latter rule of evidence is not applicable however to proof of fraud, which in Maryland requires clear and precise evidence. *See, e.g., Fourifoy v. Congressional Motors*, 254 Md. 501, 255 A. 2d 332 (1969); *Rent-A-Car Co. v. Globe and Rutgers Fire Ins. Co.*, 161 Md. 249, 156 Atl. 847 (1931).

III.

SEVERAL ADDITIONAL GROUNDS WERE RAISED BY RETAIL CREDIT ON APPEAL WHICH WOULD SUFFICE TO SUPPORT THE DECISION OF THE FOURTH CIRCUIT.

A Writ of Certiorari should not issue unless there is a reasonable prospect that the outcome in the lower court will ultimately be altered. In this case, there are other sufficient grounds to support the decision which were never reached by the Fourth Circuit in view of its resolution of the limitations issue:

(a) There was no legally sufficient evidence of actual malice, as defined under the common law, to overcome the conceded qualified privilege of Retail Credit Company as a mercantile credit reporting agency.

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[6] In her enthusiasm the plaintiff at p. 19 of her Petition simply misstates the facts in asserting "although she specifically requested him to inform her of the existence of other reports that Retail Credit might have written about her . . ." Moreover Cronin expressly stated that he did not either admit nor deny that Retail Credit had prepared a report on the plaintiff (App. 264).

(b) The constitutional guarantees of freedom of speech and press under the First and Fourth amendments to the Constitution applied to the Encasco report and, under the facts, bar a recovery in a state libel action thereon, *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 295 F. Supp. 889 (W.D. Pa., 1968), *modified*, 308 F. Supp. 1002 (W.D. Pa., 1970).

(c) The verdict for compensatory damages and the award for punitive damages were excessive.

(d) The verdict of compensatory and punitive damages was the result of passion, prejudice, pity or sympathy, and therefore was not properly subject to correction by remittitur.

(e) The due process and equal protection guarantees of the Federal and Maryland Constitutions bar unmeasured and essentially unlimited recoveries in libel cases such as that herein obtained by the plaintiff.

(f) The plaintiff's claim was barred by her release executed on June 7, 1967.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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